



Pub K

PUBLIC CONTRACTS

Annual Review 2022

January 24 – 27, 2022

# DAY 1

**12:00 p.m. Bid Protests**

**2:00 p.m. Investigations, Disclosures & S&D**

**3:00 p.m. Labor & Employment**

**MONDAY, JANUARY 24, 2022**

**12:00 PM to 5:00 PM**

**Pub K**

**PUBLIC CONTRACTS**



Alan Chvotkin  
President, Pub K Group  
Partner, Nichols Liu LLP

## News for the Government Contracts Community

Pub K

PUBLIC CONTRACTS | LAW

Legal decisions and developments for the government contracts community

Pub K

PUBLIC CONTRACTS | CYBER

Monitoring the government response to cybersecurity threats and trends

Pub K

PUBLIC CONTRACTS | COMPLIANCE

Developments and insights in ethics, compliance, and FCA/FCPA enforcement

For more information  
Visit <https://pubkgroup.com/features/>

Pub K

PUBLIC CONTRACTS

# Event Sponsors

Platinum Sponsor

## NICHOLS LIU

SERVING GOVERNMENT CONTRACTORS

Gold Sponsors

pillsbury

VENABLE LLP

# Silver Sponsors

Arnold & Porter

MORRISON  
FOERSTER

COVINGTON

HK>A

Vinson & Elkins

wiley

BLANKROME  
CELEBRATING 75<sup>YEARS</sup>

PILIERO  
MAZZA

DLA PIPER

crowell & Moring

bakertilly

Holland & Knight

SheppardMullin

PERKINS COIE  
COUNSEL TO GREAT COMPANIES

BRG  
Berkeley Research Group

GT GreenbergTraurig

JENNER & BLOCK

# Today's Event Supports



C A P I T A L   A R E A  
F O O D   B A N K<sup>®</sup>



## Tips for a Good Viewing Experience

This webinar is being streamed live and is presented in listen-only mode. Your video will remain disabled throughout the session.

For the best audio quality, please ensure your computer speakers are turned on and the volume is up.

We recommend closing any programs or browser sessions that could disrupt your connection.

You might try using Chrome for a more stable experience or refresh the webpage.

## Audience Notes

- Q&A – to ask a question of the panel, please type your comment in the Q&A box at the bottom of your screen. The panel will address as many questions as time allows.
- Materials
  - Available for download at <https://pubkgroup.com/pubk-annual-review-2022/>

## CLEs

Pub K is applying for CLE approval for the Annual Review in Virginia, California, Texas, Florida, Colorado, and Kansas.

- Approval is expected but not guaranteed
- Pub K will notify participants of approval when received
- CLEs are available free of charge to Pub K subscribers
- For non-subscribers, the fee is \$75 for 1 CLE and \$150 for 2 or more
- Email [craig@pubklaw.com](mailto:craig@pubklaw.com) with questions.

## CLEs

**Important:** Many state boards require us to verify participation *during* the event.

Watch for this poll question during the panel:

Thank you for attending today's panel! Please respond to our survey if you are interested in obtaining CLEs for this session.

We will record your response to verify your participation for the CLE certificate.

## SESSION 2

# INVESTIGATIONS, DISCLOSURES, AND SUSPENSION AND DEBARMENT

MONDAY, JANUARY 24, 2022

2:00 PM to 2:50 PM

Pub K

PUBLIC CONTRACTS



Fred Levy, Co-Chair

**COVINGTON**



David Robbins, Co-Chair

**JENNER & BLOCK**



Todd Canni, Partner





# AGENDA

- State of Suspension & Debarment 2021
- Mandatory Disclosure & Present Responsibility
- Engagement with Suspension Debarment Officials
- Application of Administrative Agreements & Independent Monitors

## TOPIC 1

# State of Suspension & Debarment 2021

## TOPIC 2

# Mandatory Disclosure & Present Responsibility

## TOPIC 2

# Mandatory Disclosure & Present Responsibility

## TOPIC 3

# Engagement with Suspension Debarment Officials

## TOPIC 4

# Application of Administrative Agreements & Independent Monitors

# APPENDIX

**Background on suspension and debarment  
Mandatory disclosures  
under FAR 52.203-13**

Pub K

PUBLIC CONTRACTS

## Overview of S&D Under FAR Subpart 9.4

- Suspension and debarment (S&D) are tools used by government to protect the government from the risks associated with doing business with “non-responsible” contractors
- Non-responsible essentially means that there is information before the government that reflects negatively on the contractor’s integrity, ethics, or competency in performing government contracts
- S&D act to render a contractor ineligible from receiving new contracts
- Exclusion is accomplished by sending the contractor a notice of suspension or proposed debarment and posting their name on a public website (SAM)



## Overview of S&D Under FAR Subpart 9.4 (*cont.*)

- S&D, by one agency, has government-wide effect
- S&D are not supposed to be used to punish contractors for past misconduct; that's the role of the criminal justice system
- “Present responsibility” is the focus of a S&D proceeding
- The FAR sets forth 10 factors to assess present responsibility

# Suspension vs. Debarment

## ■ Suspension

- ▶ Facts still being developed through an investigation or legal proceedings
- ▶ No conviction or civil judgment exists
- ▶ Adequate evidence = probable cause
  - ▶ *Very low standard; gives SDOs much discretion*
- ▶ An indictment = adequate evidence

# Suspension

- Used where “immediate action” is necessary to protect Government’s interests
- Generally, may last 12 months before legal proceedings must be instituted
- Once legal proceedings are initiated, suspension may stay in place until the proceedings conclude (an indictment = legal proceedings)
- Where the Department of Justice requests, suspensions may continue for 18 months

# Debarment

- Investigation or legal proceeding has concluded resulting in conviction or civil judgment
- In the absence of a conviction or civil judgment, agency may proceed on a fact-based debarment, whereby a preponderance of evidence of improper conduct is required
  - ▶ Evidence that leads to conclusion that the fact is more probably true than not
- The FAR provides that generally 3 year term imposed, but SDOs have discretion to depart upwardly or downwardly from that number

## Who Can Be Suspended or Debarred?

- Contractors of all sizes can be suspended or debarred, including small, medium, large, and publicly-traded companies
- Any individual associated w/ a contractor can be suspended or debarred including:
  - ▷ Contractor employees;
  - ▷ Owners or officers of a contractor;
  - ▷ Consultants or representatives of a contractor
- We estimate over 50% of cases involve individuals

## Who Can Be Suspended or Debarred? (cont.)

- FAR 9.403 - “Contractor” means any individual or other legal entity that—
  - ▶ Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract ...  
or a subcontract under a Government contract; or
  - ▶ Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor

## Causes for Suspension & Debarment

- FAR 9.4 identifies many specific causes for S&D, including:
  - ▶ Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property, Fraud or criminal offense in connection with obtaining, attempting to obtain, or performing a contract, willful violations of contract terms, history of a failure to perform or of unsatisfactory performance, lack of business integrity. . .

## Causes for Suspension & Debarment (cont.)

- Catch-all “Any other cause of so serious or compelling a nature...”
- SDOs have much discretion in deciding what conduct gives rise to a cause for suspension or debarment
- Conduct need not be related to government contracting (i.e., mortgage fraud, passing bad checks ....)



## Sources of Suspension & Debarment Cases

- Investigators
- Auditors
- Contracting personnel
- Prosecutors
- Whistleblowers (competitors, contractor employees)

## Sources of Suspension & Debarment Cases (cont.)

- Public records: civil judgments, indictments, plea agreements, deferred prosecution agreements, settlement agreements, and convictions
- News stories (proactively address issues w/ SDO)
- Contractor disclosures (voluntary and mandatory)

## Effects of Suspension & Debarment

- Ineligibility for new contracts, including task orders
- May continue existing contracts and subcontracts
- But, as for existing contracts/subcontracts, may not exercise options or issue modifications that add work or extend duration
- May not be awarded subcontracts in excess of \$35K (FAR 9.405-2) (Caution: cannot break-up awards to circumvent dollar threshold)

## Effects of Suspension & Debarment (cont.)

- May not conduct business w/ government as rep or agent of other contractors
- Listed on System for Award Management, which is available to the public
- Exclusion under FAR, results in exclusion under non-procurement rule & vice versa

## Practice and Procedure

- Suspensions are initiated through a notice of suspension
- Debarments are initiated through a notice of proposed debarment
- Both result in immediate exclusion

## Practice and Procedure (cont.)

- Suspensions / Proposed Debarments
  - ▶ Contractors given 30 days to respond
  - ▶ Contractors generally make a written submission responding to the allegation
  - ▶ May request a meeting to make oral presentation in support of written submission
  - ▶ Decisions based on Administrative Record, provided to contractor upon request
  - ▶ Contractor is not entitled to discovery

## What to do Upon Receipt of a Notice

- Retain experienced debarment counsel
- Request, obtain, and review the administrative record before responding to the allegations
- Work with the SDO's counsel to establish a due date for the submission to enable you to have sufficient time to prepare a submission (extensions typically granted)
- In multi-party actions, lots of other considerations come into play

## What to do Upon Receipt of a Notice (cont.)

- Conduct fact development prior to responding so as to be able to respond/dispute allegations using objective evidence
- Ensure the complete accuracy of your submission; inaccuracies can undermine your position and/or lead to additional causes for debarment
  - ▶ SDOs often do not accept unsupported statements as true; expect that each statement will be questioned and/or verified
  - ▶ If the SDO loses trust in your word, the outcome is unlikely to be favorable



## What to do Upon Receipt of a Notice (cont.)

- Consider using a Declaration under penalty of perjury where appropriate to bolster the credibility of your submission
- Take steps to demonstrate present responsibility where appropriate
- Where you acknowledge doing something wrong, the SDO will expect that you have taken concrete steps to prevent reoccurrence
- This may include training tailored to the situation (ethics, specific compliance training, or leadership training, etc.)

## Considerations When Appearing for A Meeting

- Prior to the meeting, attempt to understand the remaining concerns held by the SDO after reading your submission, if any
- Ensure the right company personnel attend the meeting; normally the SDO wants to meet the president, the board, and/or the employees involved in alleged conduct.
  - ▶ Always ask the SDO's office whether they would like certain individuals to be present at the meeting

## Considerations When Appearing for A Meeting (cont.)

- SDOs often expect the contractor to lead the agenda so come to the meeting with an agenda but be prepared for the SDO to take control during the meeting
- Prepare for the in-person meeting and anticipate the questions the SDO and staff may ask

## Considerations When Appearing for A Meeting (cont.)

- Maintain composure at the meeting; avoid displaying anger or frustration
- Be prepared to be examined by the SDOs office; it's par for the course
- Express that you take the allegations seriously and understand why the allegations cause concern
- Answer the questions asked clearly and completely
- Core objective – demonstrate that you can be trusted, are ethical and honest, and that debarment is unnecessary to protect government

## FAR Suspension & Debarment Factors

Standards of Conduct /  
Internal Control Systems

Voluntary Disclosure

Internal Investigation  
Conducted & Shared

Full Cooperation

Paid Costs/Restitution

Disciplined Employee

Implemented Remedial Measures

Ethics and Compliance  
Policy and Training

Adequate Amount of Time  
Has Passed Since Event

Management Recognition of Problem

*\*Not all of these will apply in every case*

## SDO Decision-Making & Potential Outcomes

- Does a cause for suspension/debarment exist?
- If “yes,” then:
- Has contractor demonstrated its present responsibility?
  - ▷ If “yes” – termination is appropriate
  - ▷ If “almost” but . . . – termination and/or administrative agreement may be a candidate depending upon circumstances
  - ▷ If “no” – debarment is possible (the term depends on the circumstances)

# Administrative Agreements

- Typically, three years, but may be shorter or longer
- Administrative agreements may also provide for early termination upon satisfying certain conditions
- Elements generally include –
  - ▶ Development or enhancement of Ethics and Compliance Program, other policies and practices, and internal controls

## Administrative Agreements (*cont.*)

### ■ Elements generally include –

- ▷ Leadership engagement in Ethics and Compliance Program
- ▷ Regular reporting obligations and other oversight efforts
- ▷ Other specific corrective measures given the issues involved
- ▷ Retention of an Independent Monitor who likely will visit company facilities several times a year and prepare a report to SDO



# Mandatory Disclosures to the Government

## FAR 52.203-13 Contractor Code of Business Ethics and Conduct

Companies have a mandatory disclosure obligation whenever, in connection with the award, performance, or closeout of any government contract or subcontract performed by the Company, the Company has “*credible evidence*” that a principal, employee, agent, or subcontractor of the Company has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. Sections 3729-3733).

The FAR provides that a cause for suspension (9.407-2) and a cause for debarment (9.406-2) exist where a contractor knowingly fails to timely disclose “*credible evidence*” of a Title 18 violation identified above, a violation of the civil False Claims Act, or a “*significant overpayment*.”

FAR 3.1003(a)(3), in conjunction with the payment clauses, provides that if a contractor becomes aware of an overpayment, it shall remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment.

# Questions?



# THANK YOU!

Fred Levy  
Covington & Burling

David Robbins  
Jenner & Block

Todd Canni  
Pillsbury

Questions or Comments?  
[admin@pubkgroup.com](mailto:admin@pubkgroup.com)

# Event Sponsors

Platinum Sponsor

## NICHOLS LIU

SERVING GOVERNMENT CONTRACTORS

Gold Sponsors

pillsbury

VENABLE LLP

# Silver Sponsors

Arnold & Porter

MORRISON  
FOERSTER

COVINGTON

HK>A

Vinson & Elkins

wiley

BLANKROME  
CELEBRATING 75<sup>YEARS</sup>

PILIERO  
MAZZA

DLA PIPER

crowell & Moring

bakertilly

Holland & Knight

SheppardMullin

PERKINS COIE  
COUNSEL TO GREAT COMPANIES

BRG  
Berkeley Research Group

GT GreenbergTraurig

JENNER & BLOCK